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No. 96-1223

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOY TECHNOLOGIES, INC., PETITIONER

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the definition of "operator" in Section 3(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802(d), which includes "any independent contractor performing services" at a mine, includes a company that sells mining equipment when its service representative performs services at a mine to ensure that the equipment functions properly.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 99 F.3d 991. The decision of the Federal Mine Safety and Health Review Commission (Pet. App. 17a-29a) is reported at 17 F.M.S.H.R.C. 1303, and the decision of the administrative law judge (Pet. App. 30a-37a) is reported at 15 F.M.S.H.R.C. 2147.

JURISDICTION

The court of appeals entered its judgment on November 5, 1996. The petition for a writ of certiorari was filed on February 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Mine Safety and Health Act of 1977 (Mine Act or Act) requires each operator of a mine to comply with mandatory health and safety standards. 30 U.S.C. 801(g), 803. An "'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. 802(d).

Petitioner manufactures, sells, and services mining equipment and employs service representatives who provide follow-up services to a customer after an equipment sale. Pet. App. 18a, 31a. Between January 24 and April 7, 1992, one of those representatives, Dixson McElhannon, performed services on a number of occasions for Somerset Mining Company at its underground mine in Colorado. *Id.* at 18a-19a, 31a-32a. On April 6 and 7, 1992, McElhannon visited the mine to oversee unloading and assembly of a new continuous miner (a machine used to cut coal) and to assure that it worked properly when assembled. *Id.* at 19a, 33a.

While assisting with the assembly, McElhannon operated a remote control to move the mining machine so that maintenance workers could insert pins. Pet. App. 19a, 34a. An inspector from the Department of Labor's Mine Safety and Health Administration (MSHA), who was inspecting the mine at the time, saw McElhannon raising and lowering the machine's cutter heads while a coal miner was standing in front of it. *Ibid.* The inspector believed that McElhannon was operating the remote control in a hazardous manner that could kill the miner if the heads became activated and struck him. *Id.* at 4a, 19a, 34a. The

inspector ordered McElhannon to withdraw from the mine until he received required training, and the inspector cited petitioner for failing to train him. *Id.* at 4a, 19a-20a.[1]

2. Petitioner did not dispute that it failed to train its service representative, but contested the citation on the ground that it was not an "operator" subject to the Mine Act. Pet. App. 30a-31a, 36a. After a hearing, an administrative law judge (ALJ) of the independent Federal Mine Safety and Health Review Commission (FMSHRC), see 30 U.S.C. 815(d) and 823, found that petitioner was an operator. The ALJ reached that decision by applying a test, developed by the FMSHRC, which considers the significance of the contractor's presence at the mine as well as the duration of and frequency of its presence. Pet. App. 34a-35a. McElhannon satisfied that test, the ALJ reasoned, because he had been performing limited but necessary services, such as furnishing trouble-shooting advice in the underground area of the mine, ordering parts, and assisting in specific repairs of mining equipment that was essential and closely related to extracting and removing coal. *Id.* at 35a-36a.

The ALJ rejected petitioner's argument that it was not an independent contractor because it did not have a contract to perform services at the mine. Pet. App. 36a. Whether or not such a contract existed, the ALJ reasoned, petitioner was an independent contractor

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[1] The Mine Act requires training of miners, 30 U.S.C. 825(a); see 30 C.F.R. 48.25-48.28, and also requires inspectors to order the withdrawal of untrained miners. 30 U.S.C. 814(g)(1). Petitioner no longer disputes that McElhannon was a miner. Pet. App. 26a n.5; see 30 U.S.C. 802(g) (" 'miner' means any individual working in a coal or other mine").

because it performed continuing services in connection with its sales contracts. *Ibid.* Under the FMSHRC's test discussed above, which considers the significance of a contractor's presence as well as its frequency or duration, the ALJ also rejected petitioner's argument that an independent contractor had to be "continually present" at the mine. *Ibid.* Accordingly, the ALJ imposed a civil penalty of $100 on petitioner. *Id.* at 37a.

3. The FMSHRC affirmed. Pet. App. 17a-29a. First, it rejected petitioner's argument that under the Secretary of Labor's regulations an independent contractor must have a contract to perform services at the mine. *Id.* at 21a-22a. Then it affirmed the ALJ's use of the FMSHRC's two-part test in determining that petitioner was an operator. Substantial evidence supported the ALJ's determination that petitioner's work is essential to the mining process, the FMSHRC concluded, and petitioner's contacts with the mine were more than de minimis. *Id.* at 23a-25a.

The FMSHRC rejected petitioner's argument that the term "operator" should be construed more narrowly based on *Old Dominion Power Co.* v. *Donovan*, 772 F.2d 92 (4th Cir. 1985). That case also set forth a two-part test for determining whether a contractor is an operator: "whether the contractor is 'engaged in the extraction process' and whether it has a 'continuing presence at [a] mine.'" Pet. App. 25a (quoting 772 F.2d at 96-97). The FMSHRC explained that its interpretation of the "extraction" and "continuing presence" requirements, although broader than petitioner's, was consistent with the Fourth Circuit's recent case law. Pet. App. 25a (citing *United Energy Servs., Inc.* v. *FMSHA*, 35 F.3d 971 (4th Cir. 1994)).

Having affirmed the ALJ on that basis, the FMSHRC thus did not reach the Secretary's argument, accepted by the District of Columbia Circuit in *Otis Elevator Co.* v. *Secretary of Labor*, 921 F.2d 1285 (1990) (Thomas, J.), that any independent contractor is an operator under the Act. Pet. App. 22a, 25a-26a; cf. *id.* at 28a (concurring opinion of Commissioner Marks, who would have accepted *Otis Elevator* as the most reasoned approach to interpreting the term "operator").

4. The court of appeals affirmed. Pet. App. 1a-16a. Like the FMSHRC, it rejected petitioner's argument that an independent contractor must have a contract to perform services. *Id.* at 7a-8a. It also rejected petitioner's additional argument that it was not an independent contractor because its service representative did not control any operations at the mine he visited. *Id.* at 8a-14a. In the court's view, the common law test for "control" did not apply because Congress did not intend for the Mine Act definition of "operator" to incorporate the common law framework for distinguishing between independent contractors and employees. *Id.* at 11a. Instead, the court concluded that the Act established a new concept, an independent contractor performing services at a mine, that the Secretary reasonably interpreted not to require the contractor to have control over an area of the mine. *Id.* at 12a-13a.

The court of appeals also agreed with the FMSHRC that petitioner was an operator, though for different reasons. Rather than use the *Old Dominion* approach or what the court termed the FMSHRC's "diluted version" of that approach, the court adopted the *Otis Elevator* approach as the Secretary requested. Pet. App. 15a-16a. Like the District of

Columbia Circuit in *Otis Elevator*, the court below concluded that "the definition of 'operator' in section 3(d) of the Mine Act is clear and means just what it says—an operator includes 'any independent contractor performing services . . . at [a] mine.'" Pet. App. 16a (citing 921 F.2d at 1290). Because petitioner "sent a service representative onto mine property, who, in carrying out his job, performed services at the mine," the court concluded that it was subject to regulation as an operator. Pet. App. 16a.

ARGUMENT

The court of appeals correctly concluded that petitioner was an "operator" subject to the Mine Act. Section 3(d) of the Act specifies that an "'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. 802(d). Petitioner was a contractor who was independent of the persons who operate, control or supervise the Colorado mine at issue, and it supplied services at the mine through its service representative. Pet. App. 16a, 23a-24a, 35a-36a. It was, therefore, an "independent contractor performing services * * * at such mine," and therefore an "operator" subject to the Mine Act's health and safety standards.

Petitioner attempts to avoid the clear statutory language by arguing (1) that it was not an independent contractor (Pet. 11-17), and (2) even if it was an independent contractor, it was not an operator (Pet. 6-11). Those arguments are incorrect and do not warrant this Court's review.

1. In arguing that it is not an independent contractor, petitioner asserts that the court of appeals'

contrary holding conflicts with decisions of this Court. Petitioner posits that, because the court below construed the phrase "independent contractor performing services" in Section 3(d) of the Mine Act to be broader than the common law term "independent contractor," that holding conflicts with decisions of this Court stating that terms such as "employee," "trustee," and "bribery" retain their common law meaning unless a statute provides otherwise. Pet. 11-12.[2] Because none of this Court's cases has construed the phrase at issue in this case, there is plainly no conflict between the decision below and any of this Court's decisions. Nor is there a conflict in principle. As petitioner admits (Pet. 13), the court of appeals recognized the principle that a term should be given its common law meaning "unless the statute otherwise dictates" or unless such a construction would "thwart the congressional design or lead to absurd results." Pet. App. 10a (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992) (citations and internal quotation marks omitted)). Petitioner simply argues that the court of appeals misapplied that principle to a specific statute, a question that does not merit this Court's attention.

Moreover, the court of appeals correctly applied the principle at issue. Section 3(d) of the Mine Act uses the phrase "any independent contractor performing services" to describe an entity that is an operator even though it is not an "owner, lessee, or other person who operates, controls, or supervises a coal or

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[2] Petitioner no longer argues that a contract to perform services is necessary, and in fact it says a contract "is not a controlling document and cannot change the jurisdiction of MSHA." Pet. 16.

other mine." 30 U.S.C. 802(d). In this context, an independent contractor may thus be a person who does *not* control a mine. The purpose of Section 3(d) is to define the class of individual, corporate, or other entities that must comply with Mine Act health and safety standards, not to distinguish a more limited class of individuals who are "employees" from those who are "independent contractors" under the common law. Thus, common law rules do not necessarily apply, and the Department reasonably construes the phrase "independent contractor" to mean an entity that (1) is independent of a person who controls, supervises or operates a mine, and (2) has a contractual relationship with such a person. See Pet. App. 11a ("Congress did not intend to incorporate the common law framework for distinguishing between independent contractors and employees, but intended to establish a new statutory concept that must be interpreted, in the first instance, by the agency responsible for enforcing the provision").[3]

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[3] Petitioner also argues (Pet. 14) that the phrase "performing services or construction at [a] mine" in Section 3(d) of the Mine Act limits the preceding phrase, "independent contractor." Even if that construction is correct, it does not follow that "independent contractor performing services at a mine" is therefore a subset of common law independent contractors. Rather, it is a subset of a broader class that, while limited to entities performing services at a mine, may also include entities that are not independent contractors at common law. The cases petitioner cites as recognizing that "performing services at the mine" is a limiting phrase did not decide whether to adopt a common law reading of "independent contractor" and are therefore not contrary to the decision below on that point. See Pet. 15 (citing *Old Dominion*, 772 F.2d at 97; and *National Indus. Sand Ass'n* v. *Marshall*, 601 F.2d 689, 701 (3d Cir. 1979)).

In any event, the court of appeals' rejection of a common law test makes no difference in this case because petitioner was an independent contractor under the common law test. Pet. App. 12a-13a n.2. As the court of appeals explained, petitioner could escape regulation under a common law test "only by qualifying as an employee, i.e., a non-independent contractor." *Id.* at 13a n.2. Because Somerset Mining Company did not control the way petitioner supplied its equipment and ancillary services, petitioner cannot be deemed to be Somerset's "employee." See *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751-752 (1989) (listing factors to determine whether a hired party is an independent contractor or employee). Nor was its service representative an employee of petitioner's mine customers. See Pet. App. 13a n.2 (Somerset, the mine at issue, did not supervise or control the representative). Review is not warranted, therefore, to decide whether petitioner was an independent contractor.

2. As petitioner points out (Pet. 6-9), the courts of appeals have expressed some disagreement on whether an independent contractor performing services at a mine is necessarily an operator. The court below and the District of Columbia Circuit have agreed with the Secretary that under the plain language of Section 3(d), "any independent contractor performing services or construction at [a] mine" is an operator. 30 U.S.C. 802(d). See Pet. App. 16a; *Otis Elevator*, 921 F.2d at 1290. The Fourth Circuit has stated that "only those independent contractors who are engaged in mine construction or the extraction process, and who have a 'continuing presence' at the

mine," are operators. *United Energy*, 35 F.3d at 976 (quoting *Old Dominion*, 772 F.2d at 97).[4]

That disagreement provides no basis for review in this case, however, because petitioner would be an "operator" under either the Fourth Circuit test or the test the other courts of appeals have adopted. See Pet. App. 22a (Secretary argued that petitioner was an operator under either test). Both the ALJ and the FMSHRC held that petitioner was an operator under a test described as a "diluted version" of the *Old Dominion* test. Pet. App. 16a; see *id.* at 23a-25a, 35a-36a. The FMSHRC reasonably viewed the facts presented in this case as "consistent with recent case law in the Fourth Circuit," Pet. App. 25a, based on *United Energy*, 35 F.3d at 976. The Fourth Circuit there explained that the contractor in *Old Dominion* was not an operator "because its contacts with the mine were infrequent and remote from either mine construction or the extraction process." 35 F.3d at 976. That explanation strongly resembles the FMSHRC's test, under which an independent contractor must do work that is "sufficiently related" to the extraction process, Pet. App. 23a, and

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[4] Petitioner incorrectly argues (Pet. 8-9) that the decision below conflicts with *National Indus. Sand Ass'n* v. *Marshall*, 601 F.2d 689 (3d Cir. 1979). *National Sand* did not decide whether any independent contractor who performs services at a mine falls outside the statutory definition. Instead, it held that the Secretary was authorized to include fewer than all independent contractors as operators for purposes of proposed training regulations. *Id.* at 701; see also *Otis Elevator*, 921 F.2d at 1289-1290 (noting that although the Third Circuit "tentatively stated" that the statute might be read to exclude some independent contractors, the court also read the Mine Act to grant the Secretary discretion not to regulate all of the independent contractors covered by the statute).

have contacts with the mine that are more than "*de minimis*." *Id.* at 24a; see also *Black's Law Dictionary* 321 (6th ed. 1990) ("continuing" means "[e]nduring; not terminated by a single act or fact"). Petitioner fails the Fourth Circuit's test, as construed by *United Energy* and the FMSHRC, because its services were essential to the extraction of coal and continuing in connection with its contracts to sell mining equipment. Pet. App. 35a-36a.[5]

Moreover, the disagreement among the courts of appeals does not appear to be as extensive as petitioner contends. The District of Columbia Circuit, for example, has left open the possibility that an independent contractor's contact with a mine could be "so infrequent or *de minimis* that it would be difficult to conclude that services were being performed." *Otis Elevator*, 921 F.2d at 1290 n.3 (citing *National Sand*, 601 F.2d at 701); see also Pet. App. 16a (court below did not decide whether statute covers Xerox service representative who comes onto mine property to repair a copy machine). The Fourth Circuit, in construing the scope of Mine Act coverage, has recognized that "the proper focus of our analysis is on the safety of mining operations." *United Energy*, 35 F.3d at 975. No court of appeals

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[5] Petitioner does not dispute that it is an operator under the FMSHRC's test, but says it would not have been an operator in the Third Circuit because "its five contacts in a nine month period were 'so infrequent or de minimis' that they would not constitute 'services.'" Pet. 10. The record, however, shows more extensive contacts. See Pet. App. 24a (service representative "spent at least six days at the mine during a 2 1/2 month period, and his contacts could be expected to continue"); see also note 4, *supra* (explaining why the Third Circuit has not decided the issue presented by petitioner in this case).

has held that a contractor such as petitioner, who endangers the life of a miner by the way it performs services on mine property, see Pet. App. 19a, can escape regulation under the Mine Act.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner argues (Pet. 16) that miners are sufficiently protected because the mine owner can be cited, but such protection is not assured given that petitioner controlled the manner in which its service representative performed his services. Petitioner also erroneously suggests (Pet. 16) that if the Mine Act did not apply, the Occupational Safety and Health Act would. The latter statute would not apply, however, so long as the Mine Act exercises its jurisdiction over "working conditions of employees." 29 U.S.C. 653(b)(1). Petitioner cannot be suggesting that OSHA should regulate working conditions in the mines, or that OSHA and MSHA should both be regulating the same conditions.